SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 359

THE UNITED STATES, APPELLANT

vs.

ELMO R. ROYER

APPEAL FROM THE COURT OF CLAIMS

INDEX

1 In the Court of Claims

ELMO R. ROYER
v.
THE UNITED STATES
No. 34,193

I. *Petition. Filed September 3, 1919*

To the honorable the COURT OF CLAIMS:

The claimant, Elmo R. Royer, respectfully represents:

1. The claimant was an officer of the Medical Reserve Corps, United States Army, and as such was called into the service of the United States during the war between the United States and Germany.

2. While so serving in France as a first lieutenant of said Medical Reserve Corps, he was recommended by cablegram of August 5, 1918, of General John J. Pershing, commanding the American Expeditionary Forces in France, for promotion to major.

Said recommendation was duly received at the War Department, and was approved; and The Adjutant General of the Army announcing the orders of the Secretary of War, acting under the direction of the President, by cablegram dated September 23, 1918, announced and directed the appointment of the claimant with other officiers as majors in the Medical Corps.

The chief surgeon of the A. E. F., Brig. General Merritte W. Ireland, also under date of October 5, 1918, sent a telegram to the claimant, "You have been promoted major. Mail acceptance."

2 September 28, 1918, the claimant was officially notified by the chief surgeon of the American Expeditionary Forces in France of his promotion to major and requested to submit his letter of acceptance and oath of office to that office without delay, which claimant promptly did, immediately upon receipt of official notifications of his appointment on October 18, 1918.

3. He thereupon assumed the insignia and title of major and performed all the duties of that grade, and was paid as of the rank of major by the quartermasters having his accounts.

4. Long subsequently, however, he was informed that all these official actions had been erroneous. He protested against this statement and thereupon was informed by The Adjutant General of the Army, by order of the Secretary of War:

"The records of this office show that Major Elmo R. Royer, Medical Corps, was appointed as such September 23, 1918, per cable to General Pershing."

Notwithstanding his lawful appointment and promotion and performance of the duties of major, he was called upon to refund all differences of pay and allowances in excess of those of a captain from October 18, 1918, to February 16, 1919, upon which date a new commission as major was issued to him.

5. Claimant therefore claims the pay and allowances thus once paid to him and afterwards deducted from his pay, amounting to $240.19.

6. This claim is based among other statutes upon the provisions of the act of May 18, 1917, authorizing the President to increase temporarily the Military Establishment of the United States
3 (40 Stat. 76), as amended by the act of July 9, 1918 (40 Stat. 845), providing for appointments in the Army during the existing emergency.

No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims two hundred and forty dollars and nineteen cents ($240.19).

KING AND KING,
Attorneys for Claimant.

[Jurat showing the foregoing was duly sworn to by Elmo R. Royer. Omitted in printing.]

4 II. *General traverse. Entered Nov. 4, 1919*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *History of proceedings*

On February 20, 1922, the case was argued and submitted on merits.

On April 3, 1922, the court filed findings of fact and conclusion of law and entered judgment for plaintiff in the sum of $240.19, with an *an* opinion by Hay, J., a concurring opinion by Graham, J., and a dissenting opinion by Downey, J.

On May 26, 1922, the defendant filed a motion for a new trial.

On June 5, 1922, the defendant's motion for a new trial was allowed.

IV. *Argument and submission*

On January 8, 1924, the case was argued and submitted on new trial by Mr. George A. King, for plaintiff, and Mr. John G. Ewing, for defendant.

V. *Order. Entered Jan. 28, 1924*

This case was argued by counsel for the respective parties and submitted on the 8th day of January, 1924. On consideration whereof the court makes and files its findings of fact, and concludes that under said facts the plaintiff is entitled to recover. It is therefore adjudged and ordered by the court that the plaintiff have and recover of and from the United States the sum of two hundred and forty dollars and nineteen cents ($240.19).

It is further ordered that the majority opinion heretofore filed in said cause and the dissenting opinion by Judge Downey stand.

5 VI. *Findings of fact, conclusion of law, opinion of the Court by Hay, J., and dissenting opinion by Downey, J. Entered January 28, 1924*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, Elmo R. Royer, was on and prior to August 5, 1918, serving in France as a first lieutenant of the Medical Reserve Corps on active duty.

II

On said 5th of August, 1918, Gen. Pershing, commanding the American Expeditionary Forces, sent a cablegram to the Chief of Staff in which he recommended the "following appointments in the Medical Reserve Corps to rectify inequalities in grade due to mistakes in original appointments":

"To be majors in Medical Reserve Corps, Captains Zabdiel B. Adams * * * [and 44 others] * * * To be majors, Medical Reserve Corps, First Lieutenants * * * Elmo R. Royer * * * [and 17 others] * * *."

This recommendation was referred to the Surgeon General of the Army, who on August 22, 1918, returned the same to The Adjutant General with the first indorsement thereon as follows:

"1. Recommending approval of the appointment of the following-named officers in the Medical Corps, U. S. Army, for the period of the existing emergency, with the rank of major: Captain Zabdiel B. Adams * * * [and 43 others].

"2. Recommending approval of the appointment of the following-named officers in the Medical Corps, U. S. Army, for the period of the existing emergency, with the rank of captain: First Lieutenants * * * Elmo R. Royer * * * [and 16 others].

"3. * * *.

"4. * * *.

"5. * * *.

6 "6. A vacancy exists for these appointments in the Medical Department per letter A. G. Feb. 5, 1918."

This recommendation of the Surgeon General was approved by order of the Secretary of War indorsed thereon.

III

On September 23, 1918, The Adjutant General cabled Gen. Pershing:

"Following first lieutenants appointed majors, Medical Corps: "* * * Elmo R. Royer * * *" [and 17 others].

On September 28, 1918, the Surgeon General's office in France notified the plaintiff as follows:

"1. I am directed by the chief surgeon to inform you that you have been commissioned major, Medical Corps, U. S. A., per cable No. A1973, War Department, 23 September, 1918.

"2. You are requested to submit your letter of acceptance and oath of office to this office without delay."

The plaintiff submitted a letter of acceptance and executed the oath of office on October 18, 1918. He assumed the insignia of rank of major, performed the duties appropriate to that office, and was so officially addressed.

IV

Thereafter, on November 21, 1918, The Adjutant General of the Army cabled the commanding general in France as follows:

"Referring to your subparagraph E, paragraph 1, cablegram No. 1559, recommending certain Medical Reserve Corps officers for promotion, and to paragraph 9, cablegram 1973, from this office, advising that the following-named first lieutenants had been appointed majors in the Medical Corps—

"* * * Elmo R. Royer * * * [and 17 others].

"you are advised that the cablegram from this office was in error in advising you of the appointment of these officers as majors.

"The records of this office show that these officers were recommended by the Surgeon General for appointment as captains and his recommendation approved by the Chief of Staff, and the above-mentioned officers were so appointed."

The first indorsement on this communication of November 21 was to the effect that by command of Gen. Pershing each of the officers named would assume his proper rank and make proper adjustment of pay overdrawn.

The second indorsement was as follows:

"It is recommended that inasmuch as these officers accepted their promotions to the grade of major in good faith and have drawn pay for such in good faith, that they be allowed to retain pay drawn as major up to the time of their acceptance of commission as captain."

The third indorsement was as follows:

"1. Although the officers referred to herein accepted their promotions to the grade of major in good faith and have drawn pay for such in good faith, there is no legal way in which they may be paid as major because of error in the cable. In other words, an acceptance of a commission as major when such commission was not issued would not constitute a valid claim for pay as major.

7 "2. It is requested that this office be furnished with latest address in the case of each of the officers mentioned herein in order that action may be taken toward having pay refunded on account of overpayment.

"By authority of the chief quartermaster."

At that time plaintiff was in a hospital. He was on October 18, 1918, in base hospital 44, then in base hospital 8, then in base hospital 35, consecutively until November 15, 1918, on which date he sailed for the United States with other casuals. He was not in France at the date of the order of November 21. After his return to the United States and while still in a hospital plaintiff received his first notice of the above-stated error.

On February 19, 1919, a communication dated American Expeditionary Forces, France, from the chief surgeon, to Capt. Elmo R. Royer stated:

"1. I am directed by the chief surgeon to inform you that you have been commissioned major, Medical Corps, U. S. A., per S. O. 48, par 88, G. H. Q., A. E. F., dated 17 February, 1919.

"2. You are requested to submit your letter of acceptance and oath of office to this office without delay."

This appointment is shown by the record to be a promotion from the rank of captain to that of major, with rank from February 17, 1919.

V

On January 7, 1919, the chief quartermaster addressed a communication to the plaintiff in base hospital 44, as follows:

"1. Hereto attached, for your information, is copy of letter, dated November 21, 1918, from The Adjutant General of *th* Army, together with 1st ind. of G. H. Q., A. E. F., dated December 17, 1918.

"2. In view of instructions contained therein, you will please refund either in cash or by deduction on your pay voucher the difference between the pay of major from date of acceptance of commission as such and pay of captain up to and including date last paid as major.

"3. Please return this communication with report of action taken."

When this came to the attention of plaintiff he replied on February 21, 1919, to the effect that he had been ordered to the United States and sailed November 15, 1918, and that he had taken the matter up with The Adjutant General's Office, Washington, for adjustment. The plaintiff's statement was to the effect that he had been appointed major with rank from September 23, 1918, as per cable from The Adjutant General. The Adjutant General stated on March 3, 1919,

that the records of his office showed that Maj. Elmo R. Royer, Medical Corps, was appointed as such September 23, 1918, per cable to Gen. Pershing.

The matter in due course reached The Adjutant General's office, which reached the conclusion * * *.

"3. This office adheres to its former views, that where, as in this case, the records disclose that Lieut. Royer was actually appointed captain, and erroneously notified that he was appointed major, he would not be entitled to the rank and pay of major. Having erroneously drawn the pay of major since October 18, 1918, he should be required to refund the difference."

8 VI

The plaintiff was paid as major from October 18, 1918, until the date of his reappointment in February, 1919. From the date of this reappointment in 1919 he was paid as major. At the date of his discharge, August 31, 1919, there was paid him on account of his pay and allowances as major the sum of $240.10 less than was due him.

The plaintiff had applied for a discharge, and on August 23, 1919, he was informed that he would not be permitted to take advantage of a leave of absence for purpose of discharge until he had made proper settlement of the claim of the Government; that he had been paid as major prior to February, 1919, instead of being paid as captain for that period, and that he should restore the difference between the pay of captain and the pay of major, that amount being $240.19. There was accordingly deducted from the amount due the plaintiff the said sum of $240.19, and this amount has never been restored or paid to him.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $240.19. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of two hundred and forty dollars and nineteen cents ($240.19).

OPINION

HAY, *Judge*, delivered the opinion of the court:

The plaintiff in the year 1918 was serving in France as a first lieutenant in the Medical Reserve Corps of the Army of the United States. On August 5, 1918, General Perishing by cable recommended that the plaintiff be promoted to the office of major in the Medical Reserve Corps. On August 22, 1918, the Surgeon General of the Army recommended that the plaintiff be appointed to the office of captain in the Medical Reserve Corps, which recommendation was approved by the Secretary of War. On September 23, 1918, The Adjutant

General of the Army cabled to General Pershing that the plaintiff had been appointed major, Medical Corps. On September 28, 1918, the plaintiff was notified by the chief surgeon of the American Expeditionary Forces that he had been commissioned major, Medical Corps, and the plaintiff was requested to submit his letter of acceptance and oath of office; the plaintiff accepted the commission and took the oath of office on October 18, 1918, and assumed the insignia of the rank of major, performed the duties of that rank, assumed its responsibilities, and was officially addresed as major. He was paid as a major from October 18, 1918, to the date of his discharge August 31, 1919.

On November 21, 1918, The Adjutant General of the Army stated in an official communication to General Pershing that there was an error in the cablegram appointing plaintiff as major, and that his appointment was as captain only. On December 17, 1918, it was ordered by competent authority that the plaintiff assume his proper rank and make proper adjustment of pay overdrawn. By an order of February 17, 1919, the plaintiff was again promoted to the rank of major. The plaintiff was not informed until February 19, 1919, that there had been a mistake in his first appointment as major. He was paid by the pay officers as major during his entire service from October 18, 1918, to the date of his discharge on August 31, 1919. At that time there was checked against him and deducted from his pay the sum of $240.19 as having been overpaid him from October 18, 1918, to February 16, 1919, in the rank of major over and above the pay of a captain.

The plaintiff claims that he was legally and regularly appointed to the rank of major, and that he held that office from the date of his acceptance and taking the oath of office on October 18, 1918, and therefore is entitled to the pay of a major. The evidence does not bear out the claim of the plaintiff that he was legally and regularly appointed to the rank of major. That claim is based upon the cablegram of General Pershing recommending the appointment, and the cablegram of The Adjutant General of the Army stating that the appointment had been made, but in the meantime and before the last cablegram had been sent the plaintiff had been appointed a captain by order of the Secretary of War. General Pershing was advised of the error made by The Adjutant General, and issued an order for its correction. The order so issued was not a revocation of the appointment of the plaintiff as major, for no such appointment had in fact been made. The Adjutant General in sending a cablegram had inadvertently misstated a fact; he had no power to make an appointment; he could only issue the notice of an appointment; and if he made a mistake in so doing, such action on his part could not have the effect of making an appointment. To say that it could would be to clothe The Adjutant General with powers which he does not possess under the law, and would in effect be conferring upon him powers which are lodged only in the hands of the President and the Secretary of War. It follows that the plaintiff can not main-

tain a suit in this court to recover the pay of a major for a period during which he did not legally hold the office of major.

In this case the plaintiff accepted the office of major in good faith; he took the oath of office with no knowledge that any mistake had been made in his promotion; he discharged the duties of the office; assumed its responsibilities, and rendered service to the Government as such officer during the time that it is now proposed his pay shall be taken from him. He was paid for his services in good faith by the officers of the Government charged with that duty. He was paid as major from October 18, 1918, to February 17, 1919, on which latter date he was regularly promoted to the office of major. He was paid as major from February 17, 1919, to August 31, 1919, and he was clearly entitled to be so paid, having been regularly appointed major on February 17, 1919.

The plaintiff supposed, and had a right to suppose, that he was in law and in fact a major and entitled to receive the pay of a major; he was paid in good faith by the officers having charge of the payment; all the parties concerned acted in good faith. The plaintiff having been ordered by competent authority to assume the rank of major, and having discharged the duties of that rank in good faith in time of war, and having been paid the emoluments of that rank in good faith by the officers who are intrusted with the duty of making such payments, he can not be required to return the money so received to the Government.

In the case of Miller v. United States (19 C. Cls. 338, 354) the court says:

"It has been repeatedly decided by courts of eminent and respectable authority that a de facto officer is entitled to fees or compensation, earned by him, while in discharge of the duties of his office which he held in good faith and not merely as a usurper."

This court in the case of Montgomery v. United States (19 C. Cls. 370, 376) held as follows:

"It is true the claimant was not a second lieutenant de jure during this time, but the President, who ordered him to service, supposed he was, and so he did. He was, however, an officer de facto, and this service was rendered in good faith. Having been paid only a fair compensation for services actually performed, he is under no legal obligation to return it."

See also Bennett v. United States (19 C. Cls. 379, 388) and Palen v. United States (19 C. Cls. 389, 394), where it is said:

"The claimant did actually perform the services attached to the office, and as it is not possible to correct the mistake on the one side by returning the services, so the mistake on the other side ought not to be corrected by compelling him to pay back the money which he had received in good faith, as the salary of an office held de facto by an error of law for which he was no more responsible than were the defendants."

The above-cited cases were not appealed from. The Supreme Court of the United States in the case of Badeau v. United States (130 U. S. 439, 452) says:

"But inasmuch as the claimant, if not an officer de jure, acted as an officer de facto, we are not inclined to hold that he has received money which, ex aequo et bono, he ought to return."

The plaintiff being entitled to the pay of a major at the date of his discharge was entitled to be paid the money due him as major, and he could not have been required, in the circumstances of this case, to return money which the Government claimed from him on account of money which it had overpaid him, such overpayment having been made prior to the time of his having been regularly appointed major on February 17, 1919. If the Government had set up this claim as a counter claim against the officer in this suit under the principles of the cases cited above, such a counterclaim could not be allowed.

Judgment will be entered for the plaintiff in the sum of $240.19. It is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

DOWNEY, *Judge,* dissenting:

I shall not discuss the principle upon which I predicate my dissent from the conclusion of my associates at a length commensurate with its importance, for, while I deem lengthy discussion unnecessary, the importance of the principle is hardly to be overstated. It is not limited to the result of this case, for it must control a class of cases, and, as it is sustained or otherwise is there preserved or destroyed an established, recognized, and necessary governmental system as old almost as the Government itself.

The plaintiff, it is rightly said, was not a major during the period from October 18, 1918, to February 17, 1919. It is not held in the majority opinion and, in my judgment, could not be held, if of any importance, that he was a major de facto. He was a captain and became a major by subsequent promotion to rank as such from February 17, 1919. He was paid during this period while a captain the pay of a major, $240.19 more for the period than the captain's pay which he was entitled to receive, and afterwards, from his pay as a major after he became in fact a major, this excess payment made to him while a captain was deducted.

The majority opinion says with undoubted correctness that he could not sue in this court for a major's pay when not a major. He in fact sues, as stated in the fifth paragraph of his petition, for "the pay and allowance once thus paid to him and afterward deducted," etc., referring undoubtedly to the excess of major's pay paid to him when a captain, apparently just such a suit as the court has said he could not maintain. But the court treats the action as one for recovery of money due him as a major and deducted to reimburse an overpayment made when a captain. I do not care to take issue with the

court's adoption of this view of the case which, seemingly, can amount to little more than the attempted attaching of an identity to money paid and money withheld while the principle must remain the same. It is said in concluding the majority opinion that "the plaintiff, being entitled to the pay of a major at the date of his discharge was entitled to be paid the money due him as major, and he could not have been required, in the circumstances of this case, to return money which the Government claimed from him on account of money which it had overpaid him, such overpayment having been made prior to the time of his having been regularly appointed major on February 17, 1919."

The circumstances of the case for consideration are, of course, the facts of the case. The inference, attempting to interpret the language with fairness, is that there is a certain dividing line in an officer's accounts, predicated upon his rank, behind which you may not go in the adjustment thereof. Or in other words that, serving in one rank, his pay in that rank, when earned, is immune from checkage or deduction because of an indebtedness to the Government accruing in a lesser rank. Such or any similar distinction seems to me wholly unwarranted and subversive of the established governmental right of deduction.

It is conceded that there was an overpayment to the plaintiff and, being an overpayment of a statutory salary, it was an illegal payment. The United States had a right to recover it. Having in its hands funds due the plaintiff by way of after accrued salary, it had a right to recover it by a deduction therefrom. That the overpayment was made before the plaintiff in fact became a major, but was in fact a captain and was entitled to be paid only as a captain, and was deducted from pay due him after he became a major, is wholly immaterial. The account was open. Such an account is never a closed account until separation from the service. There is no barrier erected between the accounts of an officer as a captain and his accounts as a major, after promotion, back of which you may not go for purposes of adjustment. The situation is the same whether he was overpaid before or after he became a major.

This checkage or deduction to reimburse the United States for an overpayment to one of its officers was not only a right of the United States but it was the duty of the proper officers to resort thereto in the protection of governmental interests to the end that money improperly paid to an officer be recovered and proper reimbursement made. No other theory can possibly work out a proper settlement of pay accounts between the Government and its officers. In no other way, in many instances, could the Government be protected against illegal payments and the retention of their fruits by the recipient. Lawsuits, even if efficacious, should not be a necessary resort when the Government has within its own hands the means for expeditious and just settlements. The Supreme Court has commended the practice because of its avoidance of "multiplicity of suits and circuity of action."

There are authorities cited in the majority opinion. The presumption must be from their citation that they are relied on as sustaining the conclusion reached. I refer simply to the fact that they all treat of de facto officers, whatever their merits may be otherwise. In each quotation in the majority opinion, presumably the applicable gist of the case, reference is made to an officer de facto, and the controlling influence of that assumed status is strongly indicated in the short quotation from the Badeau case in which the Supreme Court used the very significant word "inasmuch," a word full of meaning in the connection used.

In other classes of transactions where the relations of the parties in the circumstances may seem to offer more room for objection to the practice than in a case such as this, the practice of deduction has met with emphatic approval by the highest authority, the accounts being held to be open, and it may be said, referring thereto in the language of some of the older cases, that "the practice of set-off where one party is both debtor and creditor" has prevailed for so long that one hesitates to attempt to state its origin. Judge Richardson, one of the able former judges of this court, writing more than forty years ago, referred to it as a practice which had prevailed "from an early day" and as "sustained by judicial decision as legal and proper without any express statute on the subject." It is hardly conceivable that it is now, as a rule of recognized procedure, to be impaired or abandoned.

I regard it as unnecessary to quote from or discuss in detail the authorities. (See United States v. Burchard, 125 U. S. 176, 181; Gratiot v. United States, 15 Pet. 336; Wisconsin Central R. R. Co. v. United States, 164 U. S. 190, and cases cited; Bonnafon v. United States, 14 C. Cls. 484, 489; Taggart v. United States, 17 C. Cls. 322, 327; Howes v. United States, 24 C. Cls. 170, 185; Baxter v. United States, 32 C. Cls. 75–81–2; Grand Trunk Ry. Co. v. United States, 252 U. S. 112, 121.)

VII. *Judgment of the Court*

At a Court of Claims held in the city of Washington on the twenty-eighth day of January, A. D. 1924, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of two hundred and forty dollars and nineteen cents ($240.19).

VIII. *Petition for appeal*

From the judgment rendered in the above-entitled cause on the 28th day of January, 1924, in favor of plaintiff, the defendant, by the Attorney General, on the 31st day of March, 1924, makes appli-

cation for, and gives notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed March 31, 1924.

IX. *Order allowing appeal*

It is ordered by the court this 7th day of April, 1924, that the defendant's application for appeal be and the same is allowed.

Entered April 7, 1924.

14 In Court of Claims

[Title omitted.]

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, opinion of the court by Hay, J., and the dissenting opinion by Downey, J.; of the judgment of the court; of the application of defendant for an appeal to the Supreme Court of the United States; of the order of the court allowing said application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this tenth day of April, A. D. 1924.

[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

[Indorsed on cover: File No. 30,273. Court of Claims. Term No. 359. The United States, appellant, vs. Elmo R. Royer. Filed April 15th, 1924. File No. 30,273.]

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
ELMO R. ROYER
No. 359

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims awarding the plaintiff-appellee $240.19 upon findings of fact made after trial of the issues.

That sum represents the difference between the rate of pay of a Captain of the United States Army serving in France and that of a Major, for the period from October 18, 1918, to February 17, 1919, which the claimant drew as pay for the rank of a Major for the period stated while serving as a medical officer with the American Expeditionary Forces in France during the late war.

At the time claimant was discharged from the Army in August, 1919, in determining the final settlement to be made with him, the Disbursing Officer

deducted the $240.19, for the reason that it was an overpayment in salary due to an error in a cablegram sent by The Adjutant General on September 23, 1918, to General Pershing, stating that claimant had been promoted from a First Lieutenant to a Major, Medical Corps, U. S. A., when, as a matter of fact, he had been appointed a *Captain.*

THE FACTS

The following facts have been determined by the Court of Claims:

On August 5, 1918, while the claimant was serving in France as a First Lieutenant, Medical Reserve Corps, on active duty, General Pershing sent a cablegram to the Chief of Staff, recommending the promotion of the claimant (and seventeen others, all First Lieutenants) to be Majors, Medical Reserve Corps. The recommendation was referred to the Surgeon General of the Army, who, on August 22, 1918, returned it to The Adjutant General, recommending approval of the promotion of the claimant (and sixteen others) from First Lieutenant to Captain, stating therein that a vacancy existed for these appointments in the Medical Department. This recommendation of the Surgeon General was approved by order of the Secretary of War indorsed thereon. (Second Finding of Fact; Rec. 3–4.)

On September 23, 1918, The Adjutant General cabled General Pershing to the effect that the claimant, a First Lieutenant, had been appointed

a Major, Medical Corps (together with seventeen others therein named).

On September 28, 1918, the Surgeon General's office in France notified the claimant to the effect that he had been commissioned Major, Medical Corps, U. S. A., referring to the cablegram from the War Department dated September 23, 1918, and requesting him to submit his letter of acceptance and oath of office without delay.

The claimant submitted a letter of acceptance and executed the oath of office on October 18, 1918, assuming the insignia of the rank of Major, performing the duties appropriate to that office, and being officially addressed as such. (Third Finding; Rec. 4.)

On November 21, 1918, The Adjutant General cabled the Commanding General in France as follows:

> Referring to your subparagraph E, paragraph 1, cablegram No. 1559, recommending certain Medical Reserve Corps officers for promotion, and to paragraph 9, cablegram 1973, from this office, advising that the following-named first lieutenants had been appointed majors in the Medical Corps—
>
> "* * * Elmo R. Royer * * * (and 17 others)."
>
> you are advised that the cablegram from this office was in error in advising you of the appointment of these officers as majors.

> The records of this office show that these officers were recommended by the Surgeon General for appointment as captains and his recommendation approved by the Chief of Staff, and the above-mentioned officers were so appointed.

The first indorsement on this communication of November 21, 1918, was to the effect that by command of General Pershing each of the officers named would resume his proper rank and make proper adjustment of pay overdrawn.

The second indorsement thereon recommended that, inasmuch as the claimant (and the other officers concerned) had accepted the promotion to Major and had drawn the pay as such, all in good faith, they be allowed to retain the pay drawn as Major up to the time of the acceptance of the commission as Captain. (Fourth Finding; Rec. 4.)

The third indorsement stated (1) that, although the promotion to the grade of Major and pay therefor had been drawn in good faith by the claimant, there was no legal way in which claimant could be paid as Major because of error in the cable. "In other words, an acceptance of a commission as Major when such commission was not issued would not constitute a valid claim for pay as Major." (2) Accordingly, request was made for the latest address for each of the officers concerned in order that appropriate action may be taken toward having the pay refunded on account of overpayment. "By authority of the chief quartermaster."

At the time the order of November 21, 1918, was made, as just described, claimant was not in France, having sailed therefrom on November 15, 1918, for the United States with other casuals. From October 18, 1918, until November 15, 1918, he was in several base hospitals, named at page 5 of the record. Upon his return to the United States and while still in a hospital he received his first notice of the above-described error.

Under date of February 19, 1919, claimant was notified by the Chief Surgeon, A. E. F., France, that he had been commissioned Major, Medical Corps, U. S. A., per S. O. 48, par. 88, G. H. Q., A. E. F., dated February 17, 1919, and requesting him to submit his letter of acceptance and oath of office to the Surgeon General without delay.

This latter appointment is shown by the record to be a promotion from the rank of Captain to that of Major, from February 17, 1919. (Fourth Finding; Rec. 5.)

On January 7, 1919, the Chief Quartermaster addressed a communication to claimant in Base Hospital 44, stating that a copy of the letter dated November 21, 1918, (already referred to in the Fourth Finding) with first indorsement of G. H. Q., A. E. F., dated December 17, 1918, were attached thereto, and in pursuance thereof requested a refund, either in cash or by deduction on pay voucher, of the difference between the pay of Major from date of acceptance of commission and that of Captain up to and including the date last paid as Major.

The claimant replied on February 21, 1919, stating that he had been ordered to the United States, had sailed November 15, 1918, and had taken the matter up with The Adjutant General's office. Washington, for adjustment. His statement was to the effect that he had been appointed Major with rank from September 23, 1918, as per cable from The Adjutant General. The Court then found: "The Adjutant General stated on March 3, 1919, that the records of his office showed that Major Elmo R. Royer, Medical Corps, was appointed as such September 23, 1918, per cable to Gen. Pershing."

The matter in due course reached The Adjutant Generals office, which reached the conclusion:

> 3. This office adheres to its former views, that where, as in this case, the records disclose that Lieut. Royer was actually appointed captain and erroneously notified that he was appointed major, he would not be entitled to the rank and pay of major. Having erroneously drawn the pay of major since October 18, 1918, he should be required to refund the difference. (Fifth Finding; Rec. 5–6.)

The claimant was paid as Major from October 18, 1918, until the date of his reappointment in February, 1919. From the date of his reappointbent in 1919 he was paid as Major. At the date of his discharge, August 31, 1919, there was paid to him on account of his pay and allowances as Major the sum of $240.10 less than was due him.

On August 23, 1919, the claimant having applied for discharge, he was informed that he would not be permitted to take advantage of a leave of absence for that purpose until he had made proper settlement of the claim of the Government; that he had been paid as Major prior to February, 1919, instead of being paid as Captain for that period, and that he should restore the difference in pay between those ranks, which amounted to $240.19. Accordingly, this sum was deducted and has never been restored or paid to him. (Sixth Finding; Rec. 6.)

Upon the foregoing findings the Court of Claims (Downey, J., dissenting, Rec. 9–11) determined that claimant was not entitled to maintain a suit to recover the pay of a Major for a period during which he did not legally hold such office, but that, nevertheless, having been so paid through error, he was entitled to retain the pay, and judgment in his favor was rendered for $240.19, the difference between the rate of pay of a Captain and that of a Major, Medical Reserve Corps, for the period October 18, 1918, until February 17, 1919. (Rec. 6–9.)

THE ISSUE

The specific question involved is whether a person who has been legally appointed and commissioned a *Captain* in the Medical Corps and who has received in good faith the pay allowed by law for the rank of a Major can retain the same—

(a) When the money is paid under mistake of fact caused by an *error* made by The Adjutant

General, who has no power to appoint officers in the United States Army;

(b) When the money has been paid by a disbursing officer in good faith through oversight or negligence of some other agent of the Government; and

(c) When no such appointment as Major was ever intended, expressly or impliedly, to be made by those having authority to make such an appointment.

CONTENTIONS OF THE UNITED STATES

The Government contends: *First,* That claimant was an officer *de jure* with the rank of *Captain* Medical Corps, U. S. A., for the period October 18, 1918, to Februay 17, 1919, and therefore could not be at the same time an officer *de facto* with the rank of Major. *Secondly,* That under the facts found by the Court of Claims the overpayment was made under a clear mistake of fact through an *error* committed through oversight or negligence, and therefore is recoverable.

ARGUMENT

I

The Court of Claims has not determined as matter of fact or law that the claimant had the status of a de facto officer with the rank of Major for the period October 18, 1918, to February 17, 1919, and such a status is essential in order to preclude the Government from recovering the overpayment in salary

In the majority opinion (by Judge Hay, Rec. 6–9), the Court of Claims has taken the position that while claimant can not maintain a suit to re-

cover the pay of a Major for the period involved because he did not legally hold that office during that time (Rec. 7–8), he can not be compelled to refund the sum overpaid through error, for the reason that he had acted in good faith in the belief that he was in fact and law a Major; had executed his oath of office as a Major; had assumed its responsibilities, and had rendered service to the Government as such officer. In support of this theory the court relies upon these cases: *Miller* v. *United States*, 19 C. Cls. 338, 354; *Montgomery* v. *United States*, Id. 370, 376; *Bennett* v. *United States, Id.* 379, 388; *Palen* v. *United States, Id.* 389, 394, and *Badeau* v. *United States*, 130 U. S. 439, 452.

All of the authorities cited lay down the rule that when an *officer with power to appoint* has, through a *misconstruction of the law, appointed* a person to an office, any monies paid by agents of the Government in the belief that the appointee was an officer *de jure* can not be recovered if it should later develop that he is only a *de facto* officer, and as such has rendered services in good faith.

That rule, as pointed out in the well-reasoned dissenting opinion of Judge Downey (Rec. 9–11), has no application to the case at bar.

The reason is obvious. There is no finding of fact that the claimant was a *de facto* officer with the rank of Major for the period in question. Nor does the majority opinion so hold. It is true that quotations from other cases have been made therein

which announce the doctrine that a *de facto* officer can not be required to return money paid while in discharge of the duties of his office. But this alone is not a determination that the claimant was, as a matter of law, a *de facto* officer.

This is the view taken by Judge Downey. In this connection he says (Rec. 9):

> The plaintiff, it is rightly said, was not a Major during the period from October 18, 1918, to February 17, 1919. It is not held in the majority opinion and, in my judgment, could not be held, if of any importance, that he was a Major *de facto*. He was a Captain and became a Major by subsequent promotion to rank as such from February 17, 1919.

It is apparent, therefore, as we interpret the decision, that it announces the law to be that when money has been paid by disbursing officers of the Government, without legal authority, under a clear mistake of fact, caused by an error of some other officer *without appointive authority,* for services rendered without legal authorization, and under the same mistakes of fact, it can not be recovered, even in the absence of a *de facto* status, providing the person to whom it was paid has acted in good faith, in the belief that he was lawfully employed.

No court, as far as we have been able to determine, has ever laid down such a doctrine, which, it is plain, is so broad in its scope, so adverse and detrimental to the interests of the public, that it is nothing short of radical. It conflicts with the

settled rules which the courts have laid down for the protection of the Federal Government in the administration of its affairs. It breaks down the barrier which the courts have carefully built up around the sovereign to prevent losses, by estopping the Government from defending upon the ground that the money was paid out by a mistake of fact, and without authorization in law. Their mistakes have many times forced the Government to the courts for protection. The judiciary has zealously endeavored to prevent the loss of money on the part of the Government through errors committed by one of its servants.

We think the practical effect of the decision under consideration is to dissolve the line which this Court has carefully drawn between a mistake made by an *appointive* officer through a misconstruction of the law, as in the *Badeau case,* wherein it was held that under such circumstances the appointee was a *de facto* officer, and the ordinary mistakes of law and fact, made by agents or employees of the Government, whose acts have no contractual force, or are contrary to some controlling provision of law, as in *United States* v. *Burchard* 125, U. S. 176, or *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190. In the former case the United States was not permitted to recover. In the latter cases the United States can recover, and the question of good faith or services rendered is not involved. No person can justify the unlawful receipt of money for services performed

by pleading good faith. Something more than that is necessary, namely, that the services were authorized by an agent of the Government, invested with *appointive* or *contractual* power to bind the principal. Except in such cases it makes no difference whether the money is paid out on account of a mistake of law or a mistake of fact. The principal involved remains the same. The money can always be recovered, or be deducted in any settlement made by a disbursing officer. *Gratiot* v. *United States,* 15 Pet. 336; *Hunter* v. *United States,* 5 Pet. 172, 186; *United States* v. *Burchard,* 125 U. S. 176; *Wisconsin Cent. R. R. Co.* v. *United States,* 164 U. S. 190; *Grand Trunk Ry. Co.* v. *United States,* 252 U. S. 112, 121; *McElrath* v. *United States,* 102 U. S. 426; *United States* v. *Stahl,* 151 U. S. 366; *Sutton* v. *United States,* 256 U. S. 575, 580; *Spencer* v. *United States,* 10 C. Cls. 255; *Benjamin* v. *United States,* 10 C. Cls. 474; *Bonnafon* v. *United States,* 14 C. Cls. 484; *Taggart* v. *United States,* 17 C. Cls. 322; *Weeks* v. *United States,* 21 C. Cls. 124; *Howes* v. *United States,* 24 C. Cls. 170; *Baxter* v. *United States,* 32 C. Cls. 75; *Royal Italian Government* v. *The National B. & C. Tube Co.,* 294 Fed. 23, 27.

When the United States entered the war in 1917, the President alone was authorized to appoint officers in the Reserve Corps for active service. The National Defense Act, August 28, 1916, c. 134, Sections 37 and 38, 39 Stat. 165, 189. The Medical Corps was included, *Id.,* Section 37, 39 Stat. 190.

The Act of May 18, 1917, c. 15, 40 Stat. 76, authorized the President to increase temporarily, in view of the emergency, the military establishment of the United States, and in the third paragraph (40 Stat. 77) provided "that officers with rank not above that of Colonel shall be appointed by the President alone." General Orders, War Dept. No. 132, dated October 10, 1917; No. 78, W. D., dated August 22, 1918, and No. 162, G. H. Q., A. E. F., dated France, September 24, 1918, in force at the time the matter in dispute arose, prescribed the rules which would govern the recommendation of officers of the A. E. F. for promotion up to the grade of Colonel, or the promotion itself, where the same was within the authority of the Commander in Chief.

In effect these rules provide with regard to promotions that, if there did not exist a vacancy in France, the Commander in Chief was not authorized to make a promotion by temporary appointment, and in such a case the recommendation would have to go forward through the usual channels to the War Department for appropriate action. This is exactly what was done in the case at bar.

On August 5, 1918, claimant was a First Lieutenant in the Medical Reserve Corps serving on active duty in France. On that date General Pershing sent a cablegram to the Chief of Staff, recommending the promotion of claimant (and others of the same rank) to Major, Medical Re-

serve Corps, to rectify inequalities in grade due to mistakes in original appointments. (Second finding, Rec. 3.)

It is reasonable to assume that this cablegram was sent pursuant to the General Orders referred to, no vacancies existing in France which would have authorized General Pershing to make the promotions himself by temporary appointments.

The cablegram was referred to the Surgeon General, who, on August 22, 1918, returned the same to The Adjutant General, recommending claimant (and others) for promotion to the rank of *Captain*, and not *Major*, as recommended by General Pershing. (Rec. 3.) In the first indorsement thereon it is stated by the Surgeon General,

> 6. A vacancy exists for these appointments in the Medical Department.

This recommendation of the Surgeon General was approved by the Secretary of War. (Rec. 4.) Accordingly, claimant was promoted by appointment to the rank of *Captain*, Medical Reserve Corps.

The Adjutant General, in his cablegram dated September 23, 1918, notifying General Pershing of the appointment of claimant, stated through error, that claimant had been appointed a Major. (Third Finding, Rec. 4.) This was an error made by The Adjutant General or one of his subordinates, because as a matter of fact claimant had been appointed a *Captain* and not a Major. In ignorance of this error, relying upon the truth of the state-

ments of the cablegram, and following the usual procedure, the Surgeon General's office in France, on September 28, 1918, notified claimant that he had been appointed a Major; requested him to submit his letter of acceptance and to execute his oath of office without delay. Claimant, without knowledge of the error, and in conformity with the request, forwarded his letter of acceptance and executed the oath of office on October 18, 1918.

On November 21, 1918, The Adjutant General by cablegram advised General Pershing of the error. The first indorsement thereon stated that by command of General Pershing the claimant (together with all the other officers affected by the error) would assume the proper rank (that of Captain) *and make proper adjustment of pay overdrawn.* The second indorsement (by whom made is not disclosed by the record) recommended that claimant be permitted to retain the pay because he had acted in good faith in the matter. The third indorsement, by authority of the Chief Quartermaster, apparently in answer to the second indorsement, stated that the overpayment could not be legally retained by claimant (and the other officers), assigning therefor the following reason:

> In other words, an acceptance of a commission as Major when such commission was not issued would not constitute a valid claim for pay as Major. (Rec. 5.)

Accordingly, it was requested that the Quartermaster be furnished with the latest address of each of the officers concerned, in order that appropriate action might be taken to obtain a refund on account of the overpayment.

The claimant received notification of the error after he had returned to the United States, but the record does not disclose the exact date thereof. (Fourth finding, Rec. 4–5.) The amount overpaid was deducted from claimant's pay in the final settlement of his account on the date of his discharge from the Army.

We think it plain that under the facts found by the Court of Claims the claimant never became a *de facto* officer with the rank of Major for the period October 18, 1918, to February 17, 1919.

The claimant has not shown that the office existed to which he alleges he was appointed. A person can not become a *de facto* officer unless there be a *de jure* office to fill, *Norton* v. *Shelby County,* 118 U. S. 425; *Romero* v. *United States,* 24 C. Cls. 331. In other words, there can not be a *de facto* officer in a *de facto* office. *In re Norton,* 64 Kan. 842; *Rasmussen* v. *Laramie County,* 8 Wyo. 277.

The decided cases, both of the Federal and State courts, dealing with the subject of what constitutes a *de facto* officer, usually involve either the question of whether there was a legal office to hold, or whether the appointee held title to the office. The cases dealing with the proposition of whether a

person is a *de facto* officer all seem to involve the question of whether he could qualify or whether the *appointing officer* had authority to make the appointment. That is not the situation in this case.

Here the record plainly shows that there was no attempt, expressly or impliedly, on the part of any officer having authority to appoint the claimant to the rank of Major, to exercise that power. The procedure followed by the officers in France in reliance upon the cablegram notifying them that the claimant had been appointed a Major was *pro forma*. It is clear that General Pershing did not attempt to appoint the claimant to such an office in the absence of a vacancy, and the record does not show that a vacancy existed in France. He certainly did not intend so to appoint claimant a major, because he expressly commanded that claimant (and the other officers involved) assume his (or their) proper rank, (that of a captain), and make a refund of the overpayment. (Rec. 4.)

The Adjutant General had no authority to appoint officers in the Army, therefore we can not say that the error committed by him made the claimant a *de facto* officer, for the reason that his act was not the act of the Secretary of War. He merely performed the *Secretarial* duty of informing General Pershing of the action taken upon his recommendation, but in so doing made a mistake.

The claimant has, therefore, failed to show two important elements necessary to make him a *de facto* officer: *First*, That there was a *de jure* office;

and *secondly*, That some one with authority to appoint him to an office, either expressly or impliedly exercised or attempted to exercise that authority. The absence of these two important factors militates against any idea that the claimant was a *de facto* officer with the rank of Major. Therefore, the facts in the case at bar are quite different from those involved in *Badeau* v. *United States*, 130 U. S. 439, 452, and the other cases cited in the majority opinion.

An exhaustive examination of the judicial authorities has failed to disclose a case in any way similar on the facts to the case at bar.

There is, however, one case decided by the Court of Claims somewhat analogous to the instant case. In *Truitt* v. *United States*, 38 C. Cls. 398, it appeared that Truitt was a Captain in the Regular Army and sought to recover the pay of a Major while on staff duty as Assistant Adjutant during the war with Spain, less the pay received by him as Captain. The Secretary of War assigned him to staff duty. It did not appear, however, that the President had appointed Truitt to such office, or that he directed the issuance of the order. Truitt, however, was paid at the rate of a Major, but was compelled to refund and did refund the amount so paid in excess of that allowed a Captain. The court determined that the action of the Secretary of War was not the action of the President, and therefore Truitt was not entitled to the rate of pay of a Major. It then went on to say that the fact

that Truitt had performed the services did not entitle him to recover, for the reason that it was essential to show that the President appointed him or assigned him to the duty which he performed, and inasmuch as he had failed to do this, there could be no recovery. The similarity of the Truitt case and the one at bar is this: In the Truitt case, the Secretary of War issued an order which he had no authority to do so far as making the Government liable for compensation to the officer who performed the duty. In the latter case there was no authority in The Adjutant General to appoint the claimant as an officer in the Army. If, because of the lack of authority in the Truitt case, the claimant could not recover, the claimant in the present case certainly can not recover, for the additional reason that there was no attempt to make an appointment, for it was a plain error committed by an officer of the Government, not involving the exercise of judgment or discretion, that was responsible for the overpayment.

In addition to the *Truitt* case, however, there is one somewhat similar to the case at bar which arose in the office of the Comptroller of the Treasury and may be found in Volume 17, Compt. Dec., at page 219. In brief, the facts were these: One *Allen* Parker, of Fairmont, Indiana, was designated by the President for examination for appointment as Second Lieutenant. He was examined and qualified. His commission was made out on April 22, 1899, in the

name of *Allen* Parker, but was sent to the address of *Austin Allen* Parker, Stevens Building, Indianapolis, Indiana, under the mistaken impression that these two Parkers were one and the same man, and the address of *Allen* Parker not being known at that time. Two days later *Allen* Parker informed The Adjutant General that his address was Fairmont, Indiana, but upon the assumption that his commission had been forwarded to him, no notice was taken of his letter. Nothing was heard from the commission until May 31 following, when the acceptance and oath of office of *Austin Allen* Parker were received. The commission was returned to the The Adjutant General's office June 15 for the correction of name, which was done, the name being changed to *Austin Allen* Parker. It was not until June 25, 1899, that it was discovered that Lieutenant *Allen* Parker and *Austin Allen* Parker were separate and distinct men. It did not appear that *Austin Allen* Parker had ever been designated for appointment as subject to final examination, but he accepted the commission intended for *Allen* Parker and forwarded his oath of office and letter accepting the commission. On July 5, 1899, the War Department notified *Austin Allen* Parker of the status of the case. Later, the President by special order permitted *Austin Allen* Parker to take an examination for appointment, which he did, and a new commission was issued on July 22, 1899. The Comptroller held that *Austin Allen* Parker was never a *de jure* or a *de facto* Second Lieutenant

in the United States Army, except under the new appointment. In this connection, the Comptroller at page 223, says:

> Upon the facts stated, I do not think the appellant acquired any rights under the commission in question, which was issued to Allen Parker, and not to him, and upon the facts stated I do not think he is entitled to recover any more than if said commission had never been issued; and, this being true, no order was ever issued to him to perform travel or to perform any other military service because of said commission.

Accordingly, the claim for the amount which Austin Allen Parker had refunded to the Government was disallowed.

There is no substantial difference between that case and the one at bar. In both instances the money was paid under a mistake of fact, due to an *error,* and in both cases no officer with appointive authority attempted or intended to make the appointment.

The fact that claimant took the oath of office and performed services as a major does not alone entitle him to retain any money paid under the mistake of fact. 23 Comp. Dec. 65.

It is clear that there can be no *de facto* status as an officer of the Army when such claim is based upon a plain error committed by an agent of the Government without appointive authority. See particularly 25 Comp. Dec. 925, holding that there

could not be a *de facto* officer of the Medical Reserve Corps, U. S. Army.

It follows, therefore, the instant case is clearly distinguishable from the *Badeau* and the other cases cited by the Court of Claims in the majority opinion, because the claimant never became a *de facto* officer with the rank of major during the period under consideration.

II

Under the findings of fact made by the Court of Claims the case falls within the general rule of law, so often applied by this Court, that money paid by disbursing agents under a mistake of fact can be recovered

The case at bar is controlled by the well-settled rule laid down by this court that money paid under a mistake of fact by disbursing officers of the Government can be recovered either by a direct action, *United States* v. *Barlow,* 132 U. S. 271, 281, *United States* v. *Sanborn,* 135 U. S. 271, *United States* v. *Kerr,* 196 Fed. 503, or by way of set-off, *McElrath* v. *United States,* 102 U. S. 426, *United States* v. *Burchard,* 125 U. S. 176, *United States* v. *Carr,* 132 U. S. 644, on the theory that the Government is not liable for an error committed by an agent through mistake or negligence when in so doing the officer is not exercising a judgment or discretion reposed in him by law.

In passing upon these matters the courts do not deal with the Government in the same way that they would deal with an individual. They will not

act so as to defeat the purposes of Congress, reflected in statutes, upon considerations which are applicable to agreements made between individuals. *United States* v. *Hume,* 132 U. S. 406. The general idea seems to be in such cases to protect the Government so far as it is possible from the thoughtless acts of its officers and agents. So it has been held that the Government can not be deprived of any of its rights because of the acts of its officers or agents, whether these be acts of omission or commission, if such acts are contrary to the provisions of any statute. *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291; *United States* v. *Cosgrove,* 26 Fed. 908. Nor is it estopped from asserting its rights because of the unauthorized acts of its agents and officers. *German Bank of Memphis* v. *United States,* 148 U. S. 573. Nor is it liable for acts of misfeasance, nonfeasance or negligence of its officers or agents. *German Bank of Memphis* v. *United States,* supra. The principle upon which these rules rest is well stated by Bevan, " Negligence in Law," Volume 1, page 220:

> No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of powers by its officers and agents; and the executive does not guarantee to any persons the fidelity of any of the officers or agents whom it employs, since this would involve it, in all its operations, in embarrassments and difficulties and losses which would be subversive of the public interests.

It is definitely established that the United States is not bound by any mistakes of fact made by its officers or agents. *McElrath* v. *United States*, supra; *United States* v. *Burchard*, supra; *United States* v. *Kerr*, 196 Fed. 503; *United States* v. *U. S. Fidelity & Guaranty Co.*, 151 Fed. 534. And where money has been paid out by governmental officers through mistake of fact, the Government can recover such money so paid out. Excess payments made by the United States through mistakes of its agents may be recovered. *United States* v. *Stahl*, 151 U. S. 366; *Wis. Central R. R. Co.* v. *United States*, 164 U. S. 190. These principles are just, because the voluntariness of the payment is a voluntariness on the part of the officer or agent, and there is no reason why the Government should be bound by the voluntary acts of its officers or agents any more than it should be bound by the negligence or willful misconduct of its officers or agents. It is difficult to conceive of a more destructive rule, having regard to the interests of the public, than one which would preclude the Government from recovering money paid under a mistake of fact through an error committed by an officer through oversight or negligence, as in the present case.

It is a matter of common knowledge that disbursing officers of the Government during the war in France had to rely for authority to make payments to officers upon cablegrams or orders from the

officers in command in France. There was no time to await the receipt of the commission or a confirmation or verification of the appointment, and so, under such circumstances, it is little short of preposterous to say that the Government can not recover such monies. It is not inequitable or unjust in a case of this kind to say that the officer must take the chance that the money he receives is properly authorized, otherwise he must refund it to the Government. If the rule were otherwise, the Government would be held responsible for every mistake or error committed by any of its officers, whether it be a mistake of judgment, or discretion, or a mere clerical error.

CONCLUSION

If claimant has been injured as a result of the error, his redress is either against the officer who committed the error or by application to Congress. *United States* v. *Buchanan,* 8 How. 82, 105; *German Bank* v. *United States,* 148 U. S. 573.

It is submitted that the decision of the Court of Claims is unsound in principle and law and should be reversed.

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RANDOLPH S. COLLINS,
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MARCH, 1925.

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Court Cases.

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Supreme Court of the United States.

October Term 1924.

THE UNITED STATES, *Appellant*, v. ELMO R. ROYER. } No. 359.

Appeal from The Court of Claims.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The facts of this case are stated in detail in the findings (record, pp. 3–6) and are clearly summarized in the first two paragraphs of the opinion of the court (pp. 6, 7):

"The plaintiff in the year 1918 was serving in France as a first lieutenant in the Medical Reserve Corps of the Army of the United States. On August 5, 1918, General Pershing by cable recommended that the plaintiff be promoted to the office of major in the Medical Reserve Corps. On August 22, 1918, the Surgeon General of the Army recommended that the plaintiff be appointed to the office of captain in the Medical Reserve Corps, which recommendation was approved by the Secretary of War. On September 23, 1918, The Adjutant General of the Army cabled General Pershing that the plaintiff had been appointed major Medical Corps. On September 28, 1918, the plaintiff was notified by the chief surgeon of the American Expeditionary Forces that he had been commissioned major, Medical Corps, and the plaintiff was requested to

submit his letter of acceptance and oath of office; the plaintiff accepted the commission and took the oath of office on October 18, 1918, and assumed the insignia of the rank of major, performed the duties of that rank, assumed its responsibilities, and was officially addressed as major. He was paid as a major from October 18, 1918, to date of his discharge August 31, 1919.

"On November 21, 1918, The Adjutant General of the Army stated in an official communication to General Pershing that there was an error in the cablegram appointing plaintiff as major, and that his appointment was as captain only. On December 17, 1918, it was ordered by competent authority that the plaintiff assume his proper rank and make proper adjustment of pay overdrawn. By an order of February 17, 1919, the plaintiff was again promoted to the rank of major. The plaintiff was not informed until February 19, 1919, that there had been a mistake in his first appointment as major. He was paid by the pay officers as major during his entire service from October 18, 1918, to the date of his discharge on August 31, 1919. At that time there was checked against him and deducted from his pay the sum of $240.19 as having been overpaid him from October 18, 1918, to February 16, 1919, in the rank of major over and above the pay of a captain."

The court held that as the claimant discharged the duties of the office, assumed its responsibilities, rendered service to the Government as an officer of the rank of major, and was paid for his services in good faith by the officers having charge of the payment as a major, he should not have been required to return the money so received to the Government.

These conclusions are clearly stated in the opinion of the court by Judge Hay (record, pp. 6–9). Judge Downey delivered a dissenting opinion (rec. pp. 9–11). The case is reported 59 C. Cls. 199.

Judgment was entered for the amount originally

paid him as major, $240.19 (p. 11). The United States appealed (pp. 11, 12).

BRIEF OF ARGUMENT.

The Question Stated.

The defense raised by this appeal is an attempt to punish an officer of the Army for what is claimed to have been a mistake in promoting him to the grade of major when it was intended only to make him a captain.

General Pershing, commanding the American Expeditionary Forces in France, sent a cable August 5, 1918, to the Chief of Staff of the Army recommending the promotion of this officer, then a First Lieutenant in the Medical Reserve Corps, to be a Major in that corps. Six weeks later, September 23, 1918, a cablegram was sent by The Adjutant General to Gen. Pershing giving official information that First Lieutenant Royer had been appointed a major. The Chief Surgeon of the American Expeditionary Forces thereupon promptly notified the officer. The officer promptly accepted the appointment and executed the oath of office. He assumed the insignia of rank of major, performed the duties appropriate to that rank and was so officially addressed.

Not until February 19, 1919, four months later, was the officer informed that any mistake was claimed to have existed in his appointment of September 23, 1918, and then only in connection with a new promotion to major.

He served until August 31, 1919. Shortly before that time he applied for a discharge in view of the cessation of active warfare. He was informed that he would not be permitted to take advantage of a leave of absence for purpose of discharge until he had made

proper settlement of the claim of the Government; that he had been paid as major prior to February, 1919, instead of being paid as captain for that period, and that he must restore the difference between the pay of captain and the pay of major, amounting to $240.19. There was accordingly deducted from the amount due him the said sum of $240.19, and this amount has never been restored or repaid to him (Finding VI, rec. p. 6).

AUTHORITY OF THE ADJUTANT GENERAL.

The notification of appointment given to General Pershing and by him, through proper military channels, communicated to this officer was from the Adjutant General of the Army.

The defense necessarily attacks the authoritative character of this notification. To sustain that position would be to impeach the authority of the Adjutant General under the law and Army Regulations.

The Adjutant General is the head of a staff corps of the Army (acts of June 3, 1916, sec. 6, 39 Stat. 169; June 4, 1920, c. sec. 6, 41 Stat. 765).

By the Army Regulations of 1913, Par. 774: "The Adjutant General's Department is the department of records, orders, and correspondence of the Army and the militia."

By Par. 21: "Notices of appointments and promotions are issued by the War Department through the Adjutant General of the Army."

The act of June 4, 1920, c. 227, Sec. 6 (41 Stat. 759, 765) gave statutory sanction to these provisions of the regulations; but they were in force as regulations before it.

Thus by the Army Regulations the only valid evidence of an appointment or promotion in the Army is by notice from the Adjutant General.

The following authoritative definition of the duties of this office is given in Digest Opinions Judge Advocates General, 1912, pp. 87, 88:

"I. G 3 a (2). It is an essential incident of departmental administration that there should be some office in which the action of the Secretary of War, in respect to the duty to which officers of the Army are assigned, shall be made a matter of official record; and that office should also be charged with the preparation and submission to the Secretary of War of orders changing the station of officers or appointing them to particular duties. The Adjutant General, from the nature of his office, constitutes the channel of communication between the heads of departments and the Secretary of War in such cases, and in his office the record of the action of the Secretary thereon is made a matter of permanent record."

The notice then of the appointment of the claimant as major contained in the cablegram signed by the Adjutant General and sent September 23, 1918, was the only possible valid notice of appointment. To attack that cablegram as evidence of an appointment to office is to impeach the whole authority of the Adjutant General as the proper organ of the announcement of all orders for appointment and promotion in the Army.

It was evidently so viewed not only at the time but after the whole question of the alleged mistake had arisen, not only by the Adjutant General but by the Secretary of War.

In a communication addressed by the Adjutant General's Office under date of March 3, 1919, it is certified "The records of this office show that Major Elmo R. Royer, Medical Corps, was appointed as such

September 23, 1918, per cable to General Pershing." (Record, foot p. 5; top 6.)

This very case shows the authority attached by the officers of the War Department and of the Department of Justice alike to the attesting authority of the Adjutant General. The evidence that a mistake was made in the original promotion of September 23, 1918, as well as that this officer was regularly promoted to major February 19, 1919, is precisely the same as that for the original promotion, to wit, the certification of the Adjutant General (Finding III, p. 4).

September 23, 1918, the Adjutant General cabled General Pershing of the promotion to major (Finding III, p. 4) and the Chief Surgeon A. E. F. notified the officer thereof.

November 21, 1918, the Adjutant General cabled General Pershing that the promotion to major was a mistake and that claimant was really a captain only (Finding IV, p. 4).

February 19, 1919, the Chief Surgeon of the American Expeditionary Forces in France notified the officer that he had then been promoted from captain to major (end Finding IV, middle p. 5).

March 3, 1919, the Adjutant General in the face of this alleged discovery of error in the previous appointment officially stated that the records of his office showed that this officer had been appointed a major September 23, 1918, per cable to General Pershing (Finding V, foot p. 5 and top p. 6).

The only possible reconciliation of all these discrepancies is to accept the first notification of the Adjutant General as an authentic statement of the action of the War Department.

NO SPECIAL FORM FOR COMMISSION.

In *United States* v. *Moore*, 95 U. S. 760, it was held that a notice by the Secretary of the Navy to an assistant surgeon that he would be regarded from the date of the letter as a passed assistant surgeon was a valid and sufficient appointment to that office. The court said (p. 736): "The place has every ingredient of an office, and, as we have seen, the appellee was legally appointed to it."

In *O'Shea* v. *United States*, 28 C. Cls. 392, a letter of the Secretary of War "You are hereby informed that the President of the United States has appointed you post chaplain in the service of the United States," etc., was recognized as a legal and sufficient commission.

The court said (p. 400):—

"Section 1794 of the Revised Statutes provides, in substance, that the Secretary of State shall keep the great seal, 'and shall affix the same to all civil commissions for officers of the United States to be appointed by the President, by and with the advice and consent of the Senate, or by the President alone;' and further provides that the seal shall not be affixed to any commission before the same has been signed by the President. It will be noted that this provision of law is expressly confined to 'civil' commissions for officers of the United States, thus by legal inference excluding 'military' commissions."

and also (p. 401):—

"This appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made. (*Wilcox* v. *Jackson*, 1 Peters, 498, 513; *United States* v. *Eliason*, 16 Pet. 201, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States* v. *Farden*, 99 U.

S. 10, 19; *Wolsey* v. *Chapman*, 101 U. S. 755, 769.) In our opinion the communication of November 21, with the acceptance and oath filed, made plaintiff a post chaplain during the next session of the Senate, unless some other person should be nominated to the Senate and with that body's advice and consent commissioned in his place. This did occur, but not until March, 1888."

So, here, the act of the Adjutant General, the official organ of communication to all officers of the Army was conclusive evidence that the appointment had been made. Surely the officer himself was not only warranted in acting under the appointment, but was bound to do so.

The practice prevailing throughout the Army during the war exigency of making a notice from the only proper official source serve the purpose of a commission was referred to in a report of the Committee on Military Affairs by Mr. McKellar (Senate Report #591, 65th Cong. 2d Sess. dated October 14, 1918):—

"Under the terms of a proviso in paragraph 3 of section 1, of the Army act of May 18, 1917 (C. 15, 40 Stat. 76), it was provided that the President alone (which of course means the heads of the departments) may appoint officers less than the grade of colonel. At that time the Army was small, the number of officers totally inadequate, and it was necessary that the official Military Establishment be immediately increased in an unprecedented manner. It was realized that mistakes might be made in some instances, but it was so essential that the officers should be secured at the earliest practicable moment that Congress believed that the duty of selecting these inferior officers could well be left to the initial appointing power without the requirement that the appointees should receive the sanction of the Senate."

The Attorney General, in 22 Opinions, 82, stated

that there was nothing to require the signature of the President to commissions of officers in the Navy, saying (p. 83): "The appointments provided for by this legislation are not such as by the Constitution are required to be made in any particular way."

In Opinions Judge Advocate General, Vol. 2, 1918, p. 96, in an opinion of February 12, 1918, it appears that a Lieutenant William H. Callinan upon the same day of his accepting a commission as First Lieutenant in the Engineer Officers' Reserve Corps, August 27, 1917, in time of war, received a telegram from the Adjutant General's Office addressed to Second Lieutenant Joseph B. *Callahan* at the same address, stating:

"You are placed on active duty effective September second and will proceed to Fort Leavenworth, Kansas."

Believing that this telegram was intended for him, he proceeded to Fort Leavenworth and reported for duty. He so remained for several weeks. Then the mistake was discovered by the War Department. It was held that the Adjutant General's letter, though not intended for Lieut. Callinan, was one that he as subject to such orders was required to obey. It was said:

"An officer of the Army must not stop upon the receipt of an order to quibble about mistakes in his name. If the order purports to be for him by reason of the place and circumstances of its receipt and is one which he is qualified to obey, he should obey it. Accordingly, Lieut. Callinan is entitled to mileage and pay incident to compliance with such order."

A subsequent opinion of December 7, 1918, in the same volume (p. 1046), presents the case of a retired captain detailed to active duty and appointed by temporary commission a major, which appointment he

accepted. Later he was informed by the Adjutant General's Office that the appointment to the grade of major was due to an oversight in the office of the Adjutant General and was advised that his proper rank was that of captain. The Judge Advocate General said:

"In the opinion of this office, Capt. George R. Guild, United States Army, retired, is now, and has been since November 5, 1917, a temporary major of Infantry, with rank from August 5, 1917.

Later on it is said:

"As soon as the appointing power acted in this case, the office vested in Capt. Guild, subject to his acceptance, which on November 5, 1917, completely vested the office in him."

Perhaps the case which comes nearest the present in the published reports of the Judge Advocates General is one of November 23, 1918, reported in the same volume, page 1012, here quoted in full on account of its close application.

"On December 19, 1917, The Adjutant General wired the commanding officer of a disciplinary barracks announcing the appointment of a sergeant as first lieutenant, United States Guards, National Army. At that time the appointee was not a sergeant and was not stationed at that place, but was a second lieutenant, Signal Corps, stationed at Kelly Field, Texas. These facts were communicated by the commanding officer to The Adjutant General and to the soldier. On December 24, The Adjutant General wired the commanding officer withdrawing the appointment, and on December 25 the soldier forwarded to The Adjutant General an oath of office as first lieutenant, United States Guards. The attempted withdrawal by The Adjutant General was ineffective, because an appoint-

ment once made can not be withdrawn until it is expressly or constructively refused by the appointee. The forwarding of the oath of office constituted an acceptance, and since that date the status of the soldier has been that of first lieutenant. (Mechem, Public Offices, secs. 113–115; Dig. Ops. J. A. G. 1912, p. 801; C. 16,732.)
210:14.

"War Department, J. A. G. O., November 23, 1918.
"To the Adjutant General.

"1. It appears from the papers in reference that on November 12, 1917, S., then a first sergeant, was tendered a commission as second lieutenant in the Signal Corps, which commission he accepted November 22, 1917: that on December 19, 1917, The Adjutant General wired the commanding officer, Disciplinary Barracks, Alcatraz Island, announcing that Sergt. S. was thereby appointed first lieutenant, United States Guards, National Army, and directing him to instruct said S. to wire acceptance, and upon acceptance, to report to the commanding general, Western Department by wire for instructions: that at this time S. was performing the functions of second lieutenant, Signal Corps, at Kelly Field: that the commanding officer, Disciplinary Barracks, telegraphed to the commanding officer at Kelly Field the information contained in the telegram of December 19 of The Adjutant General, and telegraphed The Adjutant General that S. was then a second lieutenant, Signal Corps, at Kelly Field; that S. learned indirectly of the appointment, and on December 25, 1917, forwarded to The Adjutant General an oath of office as first lieutenant, United States Guards; and that on December 24, 1917, The Adjutant General wired the commanding officer, Disciplinary Barracks, Alcatraz Island, withdrawing the appointment of S. as first lieutenant, United States Guards. It does not appear that notice of this withdrawal was ever given to S. Inquiry is made as to the status of S.

"2. S. is, and has been since December 25, 1917, a first lieutenant, United States Guards, United States

Army. The appointment to that office was complete without S's acceptance, and until S expressly or constructively refused the appointment it could not be withdrawn. (Mechem on Public Offices, secs. 113–115.) The fact that the communication to S. of the appointment was not made directly is entirely immaterial. (Dig. Ops. J. A. G. 1912, p. 801; C. 16732.) As soon as he forwarded his oath of office, which constituted an acceptance, he became fully invested with the office."

A De Facto Officer at Least.

But, even if this officer was not legally appointed a major, Medical Corps, by the cablegram from the Adjutant General, he was at the very least a *de facto* officer discharging the duties of the office. That cablegram was accepted by General Pershing, Commander in Chief of the American Expeditionary Forces, by the Chief Surgeon of said Forces (top p. 14), and by the claimant himself, as a legal appointment to the grade of major. He was never notified of anything else until after the end of the period covered by this claim. He wore the insignia and was recognized and performed all the duties of that rank.

In *Badeau* v. *United States*, 130 U. S. 439, this court held (last paragraph of syllabus):

"An officer whose name is placed on the retired list of the Army by the Secretary of War, in apparent compliance with provisions of law, is an officer *de facto* if not *de jure*, and money paid to him as salary can not be recovered back by the United States."

The court said (p. 452):

"Nor can we disturb the judgment adverse to the counterclaim. As between individuals, where money has been paid under a mistake of law, it can not be recovered back, but it is denied that this rule is applicable

to the United States, upon the ground that the Government is not bound by the mistakes of its officers, whether of law or of fact. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Bank of Metropolis*, 15 Pet. 377; *McElrath* v. *United States*, 101 U. S. 426.

"But inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex aequo et bono*, he ought to return."

This *Badeau* case, in part quoted in the opinion of the Court of Claims (top p. 9), as well as the four other cases quoted in the opinion of that court (last half p. 8), are alone conclusive of the right of an Army officer to retain compensation once paid to and received by him for services performed in good faith.

It is true that this suit is in form against the United States for the recovery of money. In substance, it is rather a defensive proceeding. It is to recover a deduction improperly made from pay fully accruing to the officer at the end of his service in the rank of major, after a new appointment unquestioned in form.

Decisions Against Deductions.

In the *Lynde* case, 17 Comp. Dec. 438, an officer was borne on the retired list of the Army for a number of years under a Presidential restoration held by the Comptroller not to have been valid. There was a full review of all Court of Claims and Supreme Court decisions above cited. In accordance therewith it was held that pay received by the officer in the belief that he was lawfully on the retired list, and though rendering no active duty, subject to the disqualification of all such officers, could not be set off against an independent claim of his for pay while on the active list. It was said, "The pay that a *de facto* officer has received for service

rendered can not be used as a stoppage against pay due him as an officer *de jure.*"

Still closer in circumstances to this case is that of *MacArthur,* 17 Comp. Dec. 611, where a lieutenant in the Navy was irregularly promoted to lieutenant commander. It was held (p. 615) that his promotion "had the effect to make him a *de facto* lieutenant commander from the date he received notice of his commission as such and entered upon duty thereunder, although his promotion to said office was thereafter set aside because irregular and because another officer had a prior legal right to said promotion. He could not have been a lieutenant commander in fact before he had notice that he had been commissioned as such. It appears that upon receiving notice on February 2, 1909, that he had been commissioned a lieutenant commander he served under said commission as lieutenant commander until February 24, 1909, and was paid as such officer for said period. For said service so rendered I do not think said pay can now be recovered back."

These decisions apply in every respect to the present case.

GENERAL PERSHING AUTHORIZED TO PROMOTE.

Reference is made in the brief for the United States (p. 13) to certain General Orders. The material portions of those orders are annexed as an appendix to this brief.

By General Orders #132, War Department, October 10, 1917 (*post,* p. 17) it is provided under the heading "Staff Officers":

"When a vacancy exists in a staff corps or department within the territorial limits of the United States in a grade above the lowest commissioned grade authorized by law, such vacancy shall be filled by promotion

or assignment on recommendation of the chief of the bureau. When such vacancy exists in a staff corps or department in an expeditionary force, the vacancy will be filled upon the recommendation of the commanding general of the expeditionary force in which the vacancy occurs; and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department."

By General Orders #78, War Department, August 22, 1918, (*post*, p. 18):—

"Commanding Generals of expeditionary forces serving abroad are authorized, pending the approval of the War Department, to fill all vacancies in their command below the grade of general officer."

As to staff officers it is specially provided by the same orders—

"and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department."

By General Orders #162, General Headquarters, American Expeditionary Forces, France, September 24, 1918, (*post*, p. 21) the term "vacancy" is defined. It is specially provided under the heading "The Authority by whom Promotions are made":

"1. Pending the approval of the War Department, the Commander in Chief will, by temporary appointment, make promotions to fill all vacancies below the grade of Brigadier General in the A. E. F.

"2. In the case of a recommendation for the promotion of an officer for whom no vacancy exists, such recommendation, if approved by the Commander in Chief, will be forwarded to the War Department."

Under these provisions General Pershing was vested with ample authority to fill these vacancies even had he not had the statement of the Adjutant General, which he was bound to accept as absolute verity.

There was no limit at this time on the numbers of the Officers' Reserve Corps in service in the several grades. That corps was provided for by the act of June 3, 1916 (c. 134, 39 Stat. 166). Sec. 37 (p. 189) authorized the President alone to appoint and commission reserve officers in all grades up to and including that of major.

Sec. 38 (p. 190) entitled "The Officers' Reserve Corps in War" authorized all officers of the Reserve Corps to be ordered to temporary duty with the Regular Army and provided:

"While such reserve officers are on such service they shall, by virtue of their commissions as reserve officers, exercise command appropriate to their grade and rank in the organizations to which they may be assigned, and shall be entitled to the pay and allowances of the corresponding grades in the Regular Army, with increase of pay for length of active service as allowed by law for officers of the Regular Army, from the date upon which they shall be required by the terms of their orders to obey the same."

The judgment should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellee.

APPENDIX

General Orders
No. 132.

WAR DEPARTMENT,
Washington, October 10, 1917.

By direction of the President the following regulations governing, for the duration of the war, the appointment and promotion of officers of the National Army and the National Guard are published for the information and guidance of all concerned:

1. The commanding generals of National Guard or National Army divisions serving within the limits of the United States or its possessions will submit recommendations to The Adjutant General of the Army as to promotions and appointments to fill vacancies in organizations forming part of their divisions.

Temporary appointments and promotions in their commands to all grades below that of general officer may, subject to the approval of the War Department, be made by division commanders when serving beyond the limits of the United States, to vacancies occurring within their divisions, provided that, when the division forms part of an army corps, the corps commander shall make the temporary appointments upon the recommendation of the division commander.

At home or abroad, officers rendered surplus by the consolidation of units may be assigned by division commanders to vacancies existing in their grade and arm of service.

2. * * * * * * * *

3. All officers belonging to regiments, separate units, brigades, and divisions of the National Army or National Guard, whether members of the Regular Army, National Army, or National Guard, are equally eligible for selection in accordance with the provisions of these regulations, and recommendation for appointment or promotion must be based solely on demonstrated fitness and capacity without regard to seniority.

LINE OFFICERS EXCEPT THOSE OF COAST ARTILLERY.

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COAST ARTILLERY.

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STAFF OFFICERS.

9. When a vacancy exists in a staff corps or department within the territorial limits of the United States in a grade above the lowest commissioned grade authorized by law, such vacancy shall be filled by promotion or assignment on recommendation of the chief of the bureau. When such vacancy exists in a staff corps or department in an expeditionary force, the vacancy will be filled upon the recommendation of the commanding general of the expeditionary force in which the vacancy occurs, and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department.

Vacancies in the lowest grade of each staff corps or department will be filled in accordance with law upon the recommendation of the chief of such staff corps or department.

OFFICERS ON DETACHED SERVICE.

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TERMINATION OF TEMPORARY APPOINTMENTS.

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EXAMINATIONS.

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BY ORDER OF THE SECRETARY OF WAR:
TASKER H. BLISS,
General, Chief of Staff.

Official:
H. P. MCCAIN,
The Adjutant General.

General Orders No. 78.

WAR DEPARTMENT,
Washington, August 22, 1918.

By direction of the President, General Orders, No.

132, War Department, 1917, is rescinded and the following reservations, governing for the duration of the war the appointment and promotion of officers of the Army, are published for the information and guidance of all concerned:

1. *Vacancies—how filled.* Training schools will be maintained to prepare selected non-commissioned officers and privates for commissions.

Vacancies in the grade of second lieutenant in a regiment or separate unit will be filled, in so far as practicable, by the appointment of candidates from the unit who have passed through these schools. In exceptional cases, for gallantry in action and demonstrated fitness, enlisted men may be appointed second lieutenants though not graduates of the training schools.

Vacancies in the grade of second lieutenant not filled in the foregoing manner will be filled by transfer or assignment.

Vacancies in grades below that of lieutenant colonel and above that of second lieutenant in any regiment or separate unit will be filled, so far as practicable, by the promotion of officers selected from the next lower grade in the regiment or separate unit in which the vacancy occurs. In case of necessity the selection may be made from officers of the next lower grade in the same arm or corps within the division.

Vacancies in the grade of colonel and lieutenant colonel will be filled, as far as practicable, by selection from officers in the next lower grade in the same arm of the service, in the division to which the organization in which the vacancy occurs is assigned or attached for service.

Vacancies in any commissioned grade within a division may be filled by transfer of officers of the same grade and arm or corps of the service by competent authority, when the interests of the service demand such action.

2. *Recommendations for appointment.*—A personnel board will be organized in each separate unit and regiment or higher unit. The board will be appointed by the unit commander to recommend to him details,

assignments, and appointments of officers. The board will be permanent but the members thereof will be changed so that no member will serve continuously more than three months, and having served three months he will not serve again until the expiration of three months.

Recommendations for appointment must be based solely on demonstrated fitness and capacity, without regard to seniority, except that selections will ordinarily be made from the next lower grade.

In the United States and its possessions commanding generals of divisions and of separate units will submit recommendations to The Adjutant General of the Army to fill vacancies in organizations forming part of their command.

While serving in expeditionary forces similar recommendations will be made to the commanding general of the expeditionary forces. Commanding generals of expeditionary forces serving abroad are authorized, pending the approval of the War Department, to fill all vacancies in their command below the grade of general officer.

3. Coast Artillery * * *

4. *Staff Officers.*—When a vacancy exists in a staff corps or department within the territorial limits of the United States in a grade above the lowest commissioned grade authorized by law, such vacancy shall be filled by promotion or assignment on recommendation of the chief of the bureau. When such vacancy exists in a staff corps or department in an expeditionary force, the vacancy will be filled upon the recommendation of the commanding general of the expeditionary force in which the vacancy occurs; and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department.

Appointments and promotions in the staff corps, as well as in the line, will be made solely to obtain efficiency. The policy of the War Department is, however, that only for exceptional merit will staff officers

be advanced in grade above meritorious contemporaries in the line.

5. *Officers not covered by the above paragraphs.*

* * * * * * * * *

6. All promotions and appointments made as herein prescribed will be subject to examination as to physical fitness.

(210.2, A.G.O.)

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

P. C. HARRIS,
Acting The Adjutant General.

G. H. Q.

AMERICAN EXPEDITIONARY FORCES,

General Orders }
No. 162. }

France, Sept. 24, 1918.

1. In order to put the provisions of G. O. No. 78 W.D. August 22, 1918, into operation in this command, G. O. No. 124 and Sec. 1, G. O. No. 144 c.s. these headquarters are rescinded, and the following rules governing the recommendation of officers of this command for promotion to the grade of colonel, inclusive, or the promotion itself, where the same is within the authority of the Commander-in-Chief, are published for the information and guidance of all concerned.

1. *Vacancies.*—Within the meaning of this order the term "Vacancy" means that there is a position authorized by the War Department and that this position is either unoccupied or is occupied by an officer of a grade lower than the grade authorized by the War Department. This position is authorized by the War Department in one of two ways:

First, By the approval of a table of organization.

Second, By a statement that certain classes of officers

may consist of a definite number in each of several grades, or that authority is granted for the officers in those grades to occupy the several grades according to a prescribed proportion or percentage.

There is, then, a vacancy when a position in the table of organization is not occupied by carrying on the rolls of the organization an officer of a grade as high as that authorized; or when a grade is not occupied by the entire number authorized under an allowance which authorizes a definite number in the various grades, or, in lieu thereof, a certain proportion or percentage.

2. Among officers serving in positions not covered by tables of organization authorized by the War Department, or by an allowance from the War Department of fixed numbers or percentages for the various grades, recommendations will conform to the principle that the proportion of officers of any arm, or staff corps, department or service, shall not exceed the proportion authorized by statute for the same grade in the corresponding arm, or staff corps, department or service; except that the number commissioned in the lowest authorized grade in any arm, staff corps, department or service (not limited as to number of officers) shall not be limited. Where there is no corresponding arm, or staff corps, department or service authorized by statute for the Regular Army, the proportion will be the same as for the Engineer Corps. For the purpose of determining these percentages the entire A. E. F. will not be taken as a unit; but each army will constitute a unit, the S. O. S. will constitute a unit, and the remaining officers of this class in the A. E. F. will constitute the remaining unit.

II. *The Authority by Whom Promotions are Made.*—1. Pending the approval of the War Department, the Commander-in-Chief will, by temporary appointment, make promotions to fill all vacancies below the grade of Brigadier General in the A. E. F.

2. In the case of a recommendation for the promotion of an officer for whom no vacancy exists, such recom-

mendation, if approved by the Commander-in-Chief, will be forwarded to the War Department.

* * * * * * * * *

By Command of GENERAL PERSHING.

JAMES W. MCANDREW,
Chief of Staff.

Official:

ROBERT C. DAVIS,
Adjutant General.

UNITED STATES *v.* ROYER.

APPEAL FROM THE COURT OF CLAIMS.

No. 359. Argued April 30, 1925.—Decided May 25, 1925.

1. To constitute an officer *de facto*, it is not essential that there shall have been an attempted exercise of competent or *prima facie* power of appointment. P. 396.
2. The facts that the commanding general recommended an officer's promotion and notified him of his subsequent appointment, and that the officer accepted the office and performed its duties by direction of his superiors, are evidence that a vacancy in that rank existed. P. 397.
3. Claimant, having been recommended by the commanding general during the war for promotion from the office of lieutenant to that of major, and having assumed that rank by direction of the general based on notice from the adjutant general's office that the appointment had been made, and having performed his duties and received his pay as major, was a major *de facto*, although the actual appointment was to a captaincy; and he could not be required

thereafter to refund the amount received in excess of captain's pay. P. 397.

59 Ct. Cls. 199, affirmed.

APPEAL from a judgment of the Court of Claims allowing recovery of an amount deducted from the pay of an army officer.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. Randolph S. Collins* were on the brief, for the United States.

Mr. George A. King, with whom *Messrs. William B. King* and *George R. Shields* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On August 5, 1918, General Pershing, commanding the American Expeditionary Forces, recommended by cable to the Chief of Staff the appointment of respondent, then first lieutenant, as major in the Medical Reserve Corps. The Surgeon General of the Army, to whom the recommendation was referred, recommended an approval of the appointment of respondent as captain and this was ratified by the Secretary of War. On September 23, 1918, the Adjutant General cabled General Pershing that the appointment as major had been made, and five days later the Surgeon General's office in France notified the respondent that he had been commissioned as major and requested him to submit his letter of acceptance and oath of office without delay. Respondent submitted a letter of acceptance and executed an oath of office on October 18, 1918, and thereupon assumed the insignia of rank of major, performed the duties appropriate to that office and was so officially addressed. In fact, respondent had been appointed captain and not major; but subsequently, on February 17, 1919, he was promoted to the rank of major.

He was not informed until February 19, 1919, that there had been a mistake in the first notice of his appointment as major. He was paid by the pay officers as major during his entire service from October 18, 1918, to the date of his discharge on August 31, 1919. On the latter date there was deducted from his pay, as an overpayment, the sum of $240.19, being the difference between the pay of a captain and that of a major from October 18, 1918, to February 16, 1919. This suit was to recover that amount. The court below, upon the foregoing facts, gave judgment for respondent upon the ground that "having been ordered by competent authority to assume the rank of major, and having discharged the duties of that rank in good faith in time of war, and having been paid the emoluments of that rank in good faith by the officers who are intrusted with the duty of making such payments, he cannot be required to return the money so received to the Government." 59 Ct. Cls. 199.

The Adjutant General, from the nature of his office, is the appropriate channel through which information in respect of appointments and promotions is transmitted. U. S. Army Regulations, 1913, p. 14, paragraph 21; Dig. Op. Judge Advocate General, 1912, pp. 87–88. That officer having informed General Pershing that the appointment of respondent as major had been made, General Pershing was warranted in giving notice to respondent that he had been so appointed, and respondent was justified in accepting and acting upon it. Indeed in time of war and in the field of actual military operations it was his duty to do so. Was respondent, under these circumstances, a major *de facto?* The Government contends not upon the grounds: (1) there was no attempt to appoint him to the office of major by any officer possessing the power of appointment; (2) there is no proof that there was a vacancy in the office of major. Neither ground is tenable.

1. While some general expressions will be found in the decisions tending to support the Government's contention, the rule is well established that to constitute an officer *de facto* it is not a necessary prerequisite that there shall have been an attempted exercise of competent or *prima facie* power of appointment or election. The leading case is *State* v. *Carroll*, 38 Conn. 449, 456–466, 472, where the English and American cases are fully reviewed; *In re Ah Lee*, 5 Fed. Rep. 899, 907 *et seq.*; *Heard* v. *Elliot*, 116 Tenn. 150, 154. A good general definition is to be found in *Waite* v. *City of Santa Cruz*, 89 Fed. Rep. 619, 627, expressly approved by this Court in *Waite* v. *Santa Cruz*, 184 U. S. 302, 323: "A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." A shorter definition is that of the Supreme Court of Kansas, in *Jay* v. *Board of Education*, 46 Kan. 525, 527: "A *de facto* officer is one who is surrounded with the *insignia* of office, and seems to act with authority." Here, respondent occupied the office and discharged its duties in good faith and with every appearance of acting with authority; and, upon the facts heretofore recited, since he was not a mere intruder or usurper, he must be regarded as an officer *de facto*, within the spirit of the general current of authority.

2. Of course, there can be no incumbent *de facto* of an office if there be no office to fill. *Norton* v. *Shelby County*, 118 U. S. 425, 441. But the contention that there is no evidence of a vacancy in the office of major in the present case cannot be seriously considered. Everything was done upon the theory that there was such a vacancy; the Commanding General evidently determined that there was; and respondent entered upon and actually performed the duties of that office by direc-

tion of his superior officers. These facts are enough to establish the existence of the vacancy, for it is a well settled rule that all necessary prerequisites to the validity of official acts are presumed to exist, in the absence of evidence to the contrary. *Nofire* v. *United States,* 164 U. S. 657, 660–661.

We need not determine whether respondent might have maintained an action against the Government for unpaid salary; but, clearly, the money having been paid for services actually rendered in an office held *de facto,* and the Government presumably having benefited to the extent of the payment, in equity and good conscience he should not be required to refund it. In substance the case is ruled by *Badeau* v. *United States,* 130 U. S. 439, 452, where this Court, referring to a similar situation, said: "But inasmuch as the claimant, if not an officer *de jure,* acted as an officer *de facto,* we are not inclined to hold that he has received money which, *ex aequo et bono,* he ought to return." See also, *Montgomery* v. *United States,* 19 Ct. Cls. 370, 376; *Bennett* v. *United States, id.* 379, 388; *Palen* v. *United States, id.* 389, 394.

Judgment affirmed.